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Hon. D. Jeremy Whitmire
Clerk of Appellate Courts
P.O. Box 249
Jackson, MS 39205

via U. S. Mail and email at sctclerk@courts.ms.gov

RE: Comments on Proposed Amendments to MRCP 26

Dear Mr. Whitmire:

Please allow this letter to express my personal opposition to the proposed amendment to Mississippi Rule of Civil Procedure 26 concerning rebuttal experts. My opposition is mine alone and should not be construed to be that of my firm or the Mississippi Defense Lawyers Association, of which I am the current president.

Over the last 26 years, my practice has uniformly been to represent defendants in medical malpractice, governmental liability, worker's compensation and general litigation matters in the trial and appellate courts of Mississippi. Based on that experience, and having encountered numerous situations where rebuttal proof was considered during both discovery and at trial, I oppose the proposed amendment.

Fundamentally, I oppose normalizing the concept of rebuttal witnesses. In the context of discovery, a rebuttal witness is one who is not identified by the plaintiff in plaintiff's expert disclosure and whose opinions were not disclosed. To the extent a disclosed expert's opinions may vary or need to comment on the defendant's expert disclosure, the Mississippi Rules of Civil Procedure currently in effect and the case law construing them already provide for supplementation of each parties' expert designations. Thus, to the extent a plaintiff's expert needs to counter any disclosed opinions by a defense expert, that can be accomplished, and is already required by MRCP 26's supplementation requirements.

The need for a true rebuttal witness during discovery – a new expert designated due to a legitimate "surprise" stemming from the defense experts' disclosure of opinions – is exceptionally rare. Should such a rare set of circumstances present itself, the trial court's inherent control over discovery provides a simple and available mechanism for the plaintiff to make a request to the trial court for an opportunity to address any legitimate surprise. In this regard, a true rebuttal witness should be the remote exception; it should not be the codified rule. The trial court should affirmatively analyze the validity of any claimed surprise to limit litigation and to prohibit

Response re:
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gamesmanship.

To the contrary, the natural result of an automatic rebuttal deadline will encourage a lack of preparation and result in a proliferation of litigation. If a plaintiff is given an automatic opportunity in advance to designate rebuttal witnesses, a plaintiff's efforts at an initial designation will be lessened. Plaintiff's will be incentivized to "lay in wait" to receive the defendant's designation before making definitive decisions on the fields of expertise and the identity of witnesses necessary to meet the plaintiff's burden of proof. Motions to strike rebuttal witnesses who should have been designated as part of the plaintiff satisfying the burden of proof with plaintiff's initial designation will be spawned by every rebuttal designation. When plaintiff's attempt to close the loop on duty, and especially causation, by way of rebuttal, the number of motions to strike will eclipse the number of motions for leave to designate a rebuttal witness that would be filed under the current rules when a legitimate instance of surprise actually occurs. The appellate workload in this respect will also grow exponentially. In short, there is no need to open this box if you already know it belongs to Pandora.

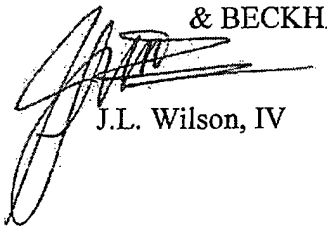
A significant issue also unaddressed by the proposed amendment is the opportunity for the defendant to respond to a rebuttal witness. Equity, if not constitutional guarantees, absolutely demand that a defendant have the opportunity to meet and challenge all proof and opinions offered against that defendant. The current rule's supplementation requirements already provide a mechanism for both parties to address any legitimate "surprise." An automatic opportunity for a plaintiff to sponsor new witnesses and new opinions, under the guise of "rebuttal," but which does not afford a defendant the same *per se* opportunity and deadline to meet new proof, offends the traditional notions of fair play upon which our system of jurisprudence is based.

For the above reasons, as well as the other reasons that opposing lawyers have expressed in their position statements, I feel confident that the Rules Committee will recognize that the existing Mississippi Rules of Civil Procedure effectively govern expert discovery in an efficient and equitable manner. As nothing is broken in this regard, there is nothing to fix, and the proposed amendment should be rejected.

Thank you for your consideration of my position.

Very truly yours,

UPSHAW, WILLIAMS, BIGGERS
& BECKHAM, LLP



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